No. 572

FEB 23 1951

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1950.

DELTA DRILLING COMPANY, - - - Petitioners,
SINCLAIR OIL & GAS COMPANY,
W. F. LACY,
B. M. HEATH,
GEORGE A. HOFFMAN,
A. W. WESSELMAN,
A. V. MARTENS,
J. RAY STEBBINS,
J. W. LILES,
T. M. PRYOR,
FLORENCE ARNETT,
FANNIE MOSS,
SUSAN CAREY,
T. S. ARNETT,
GEORGE R. ARNETT,
A. C. ARNETT,
WILLIBIE ARNETT,

versus

THOMAS E. ARNETT, - - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CHARLES G. MIDDLETON,
LOUIS SEELBACH,
LEO T. WOLFORD,
EUGENE B. COCHRAN,
Kentucky Home Life Bldg.,
Louisville 2, Ky.,
RALPH W. GARRETT,
ROBERT L. IMLER,
Sinclair Bldg.,
Tulsa, Okla.,
JACK B. BLALOCK,
CLARENCE LOHMAN,
EDWARD KLIEWER, JR.,
Gulf Bldg.,
Houston 2, Texas,
LEO KING,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
The Questions Presented	2- 3
Federal Rules of Civil Procedure Involved	4
Statement of the Case	4- 7
Specification of Errors	7
Reasons for Granting the Writ	8–12
Conclusion	13

LIST OF AUTHORITIES CITED.

Arnett v. *Sinclair Prairie Oil Co.*, 88 F. Supp. 343	2
Bowen v. *Jameson*, 223 Ky. 493	12
Clements v. *Morgan*, 307 Ky. 496, 310 Ky. 292	11
Dickinson v. *Petroleum Corp.*, 338 U. S. 507, 512	9
Flegenheimer v. *Manitoba Sugar Co.*, 182 F. 2d 742	8
Garbose v. *George A. Giles Co.*, 183 F. 2d 513	8
Hudson & Collins v. *McGuire*, 188 Ky. 712	11
Kycoga Land Co. v. *Ky. River Coal Corp.*, 110 F. 2d 894, 898	10
Sandy River Cannel Coal Co. v. *Whitehouse Cannel Coal Co.*, 125 Ky. 278, 283	10
Swiss Oil Corp. v. *Hupp*, 253 Ky. 552, 565	10
Witten v. *Damron*, 300 Ky. 29	11

Statutes and Other Authorities.

Rules of Civil Procedure, 54(b) and 56(c)	2, 4, 8, 9
United States Code. Title 28, §1254(1), §2101	2

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WILLIBIE ARNETT,

v.

THOMAS E. ARNETT, - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment of that Court (R. 772) entered in the above-entitled case December 27, 1950.

OPINIONS BELOW.

The opinion of the District Court (R. 330-339) is reported as *Arnett* v. *Sinclair Prairie Oil Co.*, 88 F. Supp. 343. The opinion of the Court of Appeals (R. 773-782) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 27, 1950 (R. 772). The jurisdiction of this Court is invoked under Title 28, U. S. C., Sections 1254(1) and 2101.

THE QUESTIONS PRESENTED.

1. Must the Court apply Rules 54(b) and 56(c) of the Rules of Civil Procedure to decide whether an order styled "Interlocutory Order and Judgment" entered on motion for summary judgment, which determines some questions as to some of the parties, but continues the case on "undisposed of" issues and "to enter final judgment," and provides that it is

"interlocutory in character and is non-appealable," is (*a*) interlocutory and not appealable, as held by the District Court; or, (*b*) final and appealable, as held by the Court of Appeals.

2. Whether the Court erred in declining to consider or apply the Kentucky rule of property as to the measure of damages ("the customary royalty on the oil removed" against "innocent trespassers") on the ground that the record does not disclose that the question was "raised before the District Court" which applied a different rule.

3. Whether the Court, in determining the meaning of a Kentucky mortgage reservation of "coal and mining rights," may disregard a Kentucky rule of property that the defining language following "coal and mining rights" limits that reservation to "coal" and to the "mining rights" which go with coal alone.

4. Whether one not a party to this suit to cancel mineral conveyances, who purchased a mineral interest from one not then a party to the suit, (*a*) is a necessary party, whose presence would destroy jurisdiction; or, (*b*) is an *un*necessary party, but bound by the judgment as a "*lis pendens*" purchaser contrary to the local law.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

Rules 54(b) and 56(c) of the Rules of Civil Procedure, as amended effective March 19, 1948, are involved.

STATEMENT OF THE CASE.

In 1915, the Respondent, Thomas E. Arnett, mortgaged his 47-acre tract of Kentucky land and reserved a portion of the mineral estate by the following reservation in the mortgage (R. 126, 261):

> "It being understood and agreed that the coal and mining rights under this land is not mortgaged or effected hereby but are reserved together with the free and uninterrupted right of way, underneath the surface, into said land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining, ventilating, coking and carrying away said coal, hereby waiving all surface damages arising from the removal of said coal, and together with the privilege of carrying through said described premises, underneath the surface, supplies, tools or other coal or minerals, underlying adjacent properties now belonging to or which may hereafter be acquired by Mortgagor his heirs or assigns."

In 1916, the mortgage was foreclosed and the mortgaged property was sold to the mortgagee (R. 276, 304). By mesne mineral conveyances from the mortgagee, the Petitioners acquired the entire mineral es-

tate except that which the Respondent had reserved in the mortgage.

In 1947 (some 31 years later) after the Petitioners had drilled oil wells on the property, the Respondent, then a citizen of Florida, sued some of the Petitioners to quiet his title to the minerals, to cancel the mineral conveyances through which the Petitioners claimed and for an accounting for the oil removed. He contended that he had reserved the oil and gas by his reservation of "coal and mining" rights in his 1915 mortgage (R. 1-15).

On November 22, 1948 (R. 358), the District Court, on the Respondent's motion for summary judgment, entered an "Interlocutory Order and Judgment," in which the Court held the Respondent, Thomas E. Arnett, to be the owner of the oil and gas, but that the order was

> "interlocutory in character and is non-appealable and this cause is now continued on the undisposed of issues herein and to enter final judgment herein."

Thereafter, Stebbins, one of the Petitioners, who was not then a party to the suit, sold to J. W. Ellis a fractional part of Stebbins' interest in the oil and gas (R. 483). Ellis was never made a party to the suit. He was a citizen of Florida, as was the Respondent (R. 1, 488).

Later, Stebbins and two other Petitioners, Pryor and Liles, none of whom were parties to the suit when the "Interlocutory" order was entered, were made parties by an amended complaint (R. 472, 3).

On September 22, 1949, the District Court entered a "Final Judgment and Decree" (R. 733), and again adjudged title to the oil and gas in the Respondent, cancelled the oil and gas conveyances through which the Petitioners claimed, awarded the Respondent the net value (gross value less cost of production) of the oil removed, and held that Ellis was not a necessary party to the suit (R. 499).

On the Petitioners' appeal from the "Final Judgment and Decree" of September 22, 1949, the Court of Appeals held:

1. As to those Petitioners who were parties to the suit when the "Interlocutory Order and Judgment" of November 22, 1948, was entered, the appeal (from the final decree) was too late because the "interlocutory" order had finally adjudged the issue of title against them although the "interlocutory" order provides that it was "interlocutory in character and is non-appealable" (R. 774-5);

2. It would not consider the District Court's error in awarding to the Respondent more than "the customary royalty on the oil removed" by "innocent trespassers"—the Kentucky rule—on the stated ground that "this question was not raised before the District Court" (R. 778-9);

3. That the mortgage reservation of "coal and mining rights" reserved also the oil and gas, and it gave no effect to the Kentucky rule of property that the defining language which follows "coal and mining rights" limits the reserved mineral estate to "coal"

and to those "mining rights" which go with coal (R. 776-7);

4. That although the decree of cancellation would be erroneous unless the interest of Ellis (who was not a party and whose presence would destroy jurisdiction) was also cancelled; nevertheless, the cancellation, which disposed of Ellis' interest, is proper on the ground that Ellis was bound as a *lis pendens* purchaser, although he purchased from one not a party to the suit at the time of his purchase (R. 781).

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In holding that the November 22, 1948, "Interlocutory Order and Judgment" was a final judgment.

2. In failing to apply the Kentucky rule of property as to the measure of damages.

3. In holding that the words "coal and mining rights" as limited by the defining words in the mortgage reserved to the Respondent the oil and gas.

4. In holding that J. W. Ellis, whose presence would destroy jurisdiction, was not a necessary party.

5. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

1. The Court's holding that the "Interlocutory" order was final, in disregard of the adjudication therein that it was "interlocutory in character and is non-appealable" converts that order into a trap not intended by the District Court, and frustrates the purpose of Rules 54(b) and 56(c) of the Federal Rules of Civil Procedure.

(*a*) The decision is in conflict with decisions of the Court of Appeals of the First and Second Circuits on the same matter.

The First Circuit in *Garbose* v. *George A. Giles Co.*, 183 F. 2d 513, and the Second Circuit in *Flegenheimer* v. *Manitoba Sugar Co.*, 182 F. 2d 742, held under Rule 54(b), that in the absence of "an express determination" of finality, an order which adjudicates less than all the claims is not a final order. Here, there was no "express determination" of finality but, on the contrary an "express determination" by the District Court that the order was "interlocutory" and "non-appealable."

The order adjudicated some "but less than all the claims" as to the parties then before the Court and left open for future adjudication the claims as to the parties later joined.

(*b*) The application of Rules 54(b) and 56(c) of the Rules of Civil Procedure as amended, effective March 19, 1948, presents an important question of federal law which has not been settled by this Court. The purpose of Amended Rule 54(b) was expressed in

Dickinson v. *Petroleum Corp.*, 338 U. S. 507, 512, but, because the judgment therein was entered before the rules were amended, the application of the amended rules was not passed on in that case.

Rule 56(c) provides that:

> "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

This is precisely what the District Court did here, but the Court of Appeals held the "interlocutory" order was final even though the judgment itself declared it to be "interlocutory in character."

(*c*) The decision below so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. It is of great importance that this Court should now pass upon the question whether, under these amended rules, a litigant is still subject to the "uncertainty and hazard" of appealing or not appealing, or whether he can rely upon the clear statement of the District Court as to finality.

2. The decision of the Court below on an important local property question conflicts with the decisions of many Kentucky cases on the measure of damages for minerals removed.

The District Court awarded the net value (value of oil less cost of production) as the measure of damages. The rule in Kentucky is that the owner can recover

against innocent purchasers only the customary royalty on the minerals removed.*

The Court held that the Petitioners are innocent trespassers and does not question the rule laid down by the Kentucky cases, but it held that "no reviewable question arises" because "this question was not raised before the District Court."†

This amounts to saying that if a court applies an erroneous rule of damages; *i. e.,* allows more than the record justifies, the error is not open to review unless the record affirmatively shows that the correct measure was argued before the District Court. The Court thus justifies an erroneous decision on a question of property contrary to the applicable local rule merely because the record does not show that the correct rule was brought to the attention of the District Court.

The correct rule of damages was necessarily considered by the District Court as it was one of the important issues in the case.

3. The decision is in conflict with applicable local decisions on a rule of property. The Court held that:

> "It is now clearly settled in Kentucky that the term 'mining rights' means minerals, and includes oil and gas."

It recognized that "the privilege of access of digging, etc., which follows in the reservation, *clearly relates only to coal."* It gave no effect, however, to this language of the reservation which defined the term "mining rights" as used therein.

Sandy River Cannel Coal Co. v. *Whitehouse Cannel Coal Co.*, 125 Ky. 278, 283; *Kycoga Land Co.* v. *Ky. River Coal Corp.*, 110 F. 2d. 894, 898; *Swiss Oil Corp.* v. *Hupp*, 253 Ky. 552, 565.

†Evidence was introduced as to the amount of the customary royalty (R. 665, 673).

In *Witten* v. *Damron,* 300 Ky. 29, the reservation, or exception, was "coal mineral excepted" followed by the restrictive language:

> "Said grantor to pay all damages that may be done the farm in getting the coal out."

The Court of Appeals of Kentucky said:

> "The fact that the instant grantor reserved the right to extract only the single mineral, coal, without liability for necessary damage to the surface, conclusively manifests an intention to reserve only the coal underlying the land he was conveying."

It held that the reservation of "coal mineral" was limited by the restrictive language which followed and which related only to coal, and "conclusively manifests" the intention to reserve coal only.

In *Hudson & Collins* v. *McGuire,* 188 Ky. 712, a mineral deed conveyed:

> "All the mineral (except stone coal) with necessary right of ways and privileges for prospecting, mining and smelting on my tract of land."

The Court held this language did not grant oil and gas because:

> "The words 'mining and smelting' are appropriate in connection with the production of many minerals other than oil and gas, but they have no place in a grant of oil or gas rights or privileges, and the use of those words, as well as the absence of suitable words to show that oil or gas was intended to be conveyed, was sufficient to put a purchaser under the deed on notice that the grant did not include oil or gas."*

*Another important case in this connection is *Clements* v. *Morgan,* 307 Ky. 496, 310 Ky. 292.

4. The decision of the court below in the instant case is directly in conflict with a decision of the Court of Appeals of Kentucky in *Bowen* v. *Jameson,* 223 Ky. 493, involving an important question of local law.

In the instant case (R. 781-2) the Court adjudicated adversely Ellis' title without his being a party to the suit. It conceded that in a suit to cancel, which this is, he would be a necessary party under its own decisions, but proceeded to decide his rights adversely without his being a party on the ground that he was a *lis pendens* purchaser. Admittedly, he purchased his mineral interest from Stebbins when Stebbins was not a party to the suit. Stebbins had acquired his interest long before the suit was filed (R. 413-15). The Court reasons that at the time Stebbins sold to Ellis, Stebbins was a creditor of the Respondent (plaintiff) under the "Interlocutory Judgment," which he could not be, because he was not a party to the suit when that judgment was entered. It says that because the deed to Ellis was recorded a few hours after Stebbins was made a party to the suit, the Respondent was protected under the Kentucky recording statutes as such creditor.

In *Bowen* v. *Jameson, supra,* the Kentucky rule was definitely stated to the effect that "a person whose interests are acquired before the action is brought *against his vendor* will not be bound by its result."

The Court thus endeavored to let Ellis' indispensability be determined by the final outcome of the case, which amounts to deciding his title without a hearing.

CONCLUSION.

Wherefore, your Petitioners respectfully pray that a Writ of Certiorari be issued to and under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of said Court of Appeals be reversed and set aside; and that the Petitioners be granted such other and further relief as the nature of the circumstances may require.

Respectfully submitted,

Chas. G. Middleton

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Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

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INDEX.

Opinions Below 1

Preface 1

I. Contention with Respect to So-called "Interlocutory Order and Judgment" and Rules 54(b) and 56(c) 2

II. Contention as to Measure of Damages..... 4

III. Contention as to Reservation in Mortgage Involved 5

IV. Contention as to J. W. Ellis being an Indispensable Party 7

Conclusion 8

TABLE OF AUTHORITIES.

Cases.

Arnett v. Sinclair Prairie Oil Co., 88 F. Supp. 343.... 1

Biggins v. Oltmer Iron Works, 154 Fed. 2d 214 (C. A. 7) 2

City of Louisa v. Levi, 140 Fed. 2d 512 (C. A. 6)..... 2

Jacobsen v. Jacobsen, 126 Fed. 2d 13 (C. A. D. C.).... 2

Kycoga Land Co. v. Kentucky River Coal Corp., 110 Fed. 2d 894 (C. A. 6)..... 3

Raytheon Mfg. Co. v. Radio Corp. of America, 76 Fed. 2d 943 (C. A. 1), affirmed 296 U. S. 459..... 2

Rudy, et al., v. Ellis, et al., 236 S. W. 2d (Ky.), decided January 30, 1951 5

Swiss Oil Corp. v. Hupp, 253 Ky. 552..... 5

United States v. Oregon, 295 U. S. 1..... 7

United States v. Wyoming, 331 U. S. 440..... 5

Statutes and Rules.

Rules of Civil Procedure, 54(b) and 56(c)..... 2, 3

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OPINIONS BELOW.

The opinion of the District Court is reported as *Arnett v. Sinclair Prairie Oil Co.*, 88 F. Supp. 343, and is found in the Record herein at pages 330-339. The opinion of the Court of Appeals for the Sixth Circuit, affirming the ruling of the District Court, has not been officially reported to date, but is found in the Record herein at pages 773-782.

PREFACE.

The petition for a Writ of Certiorari does not present any conflict in the decisions of the different circuits, or a decision on an important question of federal law that has not been settled by this Court, or a decision on a federal question that is contrary to applicable decisions of this Court, or a decision on an important question of local law in anywise in conflict with applicable local decisions, or any matter usually considered on an application for certiorari. It mentions no special or important reason for a review herein.

We will briefly respond to the specific contentions of the Petitioners therein.

I.

CONTENTION WITH RESPECT TO SO-CALLED "INTERLOCUTORY ORDER AND JUDGMENT" AND RULES 54(b) AND 56(c).

In the judgment of November 22, 1948, Respondent, Thomas E. Arnett, was decreed to be the legal owner of the oil and gas rights involved in Henderson County, Kentucky, and Petitioners were ordered to render an accounting with respect to the oil which they had wrongfully extracted and converted from his estate. (R. 358.) This was clearly a final adjudication of the title to said minerals, although counsel who drafted such judgment erroneously denominated it "Interlocutory Order and Judgment."

On September 22, 1949, a judgment was entered awarding Respondent damages under said accounting.

Petitioners appealed from only the latter judgment, and the time had then long since passed for them to appeal from the judgment of November 22, 1948.

The Court of Appeals sustained the Respondent's motion to dismiss the appeals insofar as they concerned the judgment of November 22, 1948, and pointed out in its opinion why such judgment constituted a final and complete disposition of the question of title to the minerals involved. It further pointed out that the finality thereof was to be determined not by how it was denominated or considered by the Petitioners, but by the question of whether it disposed of the case upon its merits. It clearly did the latter. *Jacobsen v. Jacobsen*, 126 Fed. (2d) 13 (C. A. D. C.); *Biggins v. Oltmer Iron Works*, 154 Fed. (2d) 214 (C. A. 7); *City of Louisa v. Levi*, 140 Fed. (2d) 512 (C. A. 6); and *Raytheon Mfg. Co. v. Radio Corp. of America*, 76 Fed. (2d) 943 (C. A. 1), affirmed 296 U. S. 459.

The Circuit Court correctly held that the said judgment of November 22, 1948 was final and appealable since it was complete and required nothing from the later one to give it finality. *Kycoga Land Co. v. Kentucky River Coal Corp.*, 110 Fed. (2d) 894 (C. A. 6).

Rules 54(b) and 56(c) of the Federal Rules of Civil Procedure are not applicable to such final judgment of November 22, 1948.

Apparently the Petitioners are trying to contend that by virtue of the 1946 amendment to 56(c) a district court now has the power to declare and make any summary judgment merely interlocutory. If such were the case, there would, of course, be no necessity for Rule 56(d) providing for partial summary judgments or Rule 54(b) providing for both final and interlocutory judgments in suits involving multiple claims.

Said decree of November 22, 1948, was in no sense a partial summary judgment, as authorized by 56(d). It was, as the Court of Appeals ruled, a judgment on the entire merits of the case against all of the defendants therein when it was entered.

Rule 54(b) which provides that "when more than one claim for relief is presented in an action" the court may direct the entry of a final judgment upon one or more but less than all of the claims, and that in the absence of an expressed determination of finality the adjudication shall not terminate the action as to any of the claims, has no application to said judgment of November 22, 1948, because the present action does not involve multiple claims. Here only one claim for relief was presented, i.e., that respondent owned the title to the minerals involved and was entitled to have same quieted, and as incidental thereto an accounting from the trespassing petitioners. He sought relief on only one claim.

We might add that although the Court of Appeals ruled that the original and principal defendants in this

litigation, being all but three of the Petitioners, were barred by time from appealing from said judgment of November 22, 1948, it expressly affirmed the District Court's adjudication of Respondent's title as to said three Petitioners, who were later made Defendants, and thereby it did in effect also review and affirm the adjudication of his title as to all of the Petitioners.

II.

CONTENTION AS TO MEASURE OF DAMAGES.

The District Court found that the Petitioners were "innocent" trespassers, and in its judgment of September 22, 1949, awarded judgment against them for the value of the oil they had wrongfully extracted and sold, less the expenses they had incurred in extracting same.

In the preparation and entering of said judgment it was tacitly conceded by counsel for the Petitioners that such was the proper measure of recovery. No question was ever raised or brought to the attention of the District Court concerning any different measure of recovery being applicable to the case. It was contended for the first time in a reply brief of the Petitioners in the Court of Appeals that the measure of recovery should have been only the customary royalty usually paid to the lessor under oil and gas leases, i.e., one-eighth (⅛) of the oil produced. Such customary royalty rule was never mentioned in the District Court, no ruling was sought thereon, and the Petitioners did not make known to the court any action which they desired it to take with respect thereto. Petitioners now complain because the Court of Appeals held that under such circumstances the question as to the customary royalty rule was not reviewable. However, later in its opinion the Court of Appeals did rule upon the question of the proper measure of damages in the following language:

> "Under Kentucky law, if a trespass is willful or reckless, the proper measure of damages is the aggregate of the gross receipts with interest from the dates

> of collection, with no deduction for cost of producing the minerals taken. If the trespass is innocent, the measure of damages is the amount of gross receipts less the cost of production. Swiss Oil Corp. v. Hupp, 253 Ky. 552; United States v. Wyoming, 331 U. S. 440."

This statement as to the law in Kentucky on the measure of damages for the wrongful extraction of oil of another is eminently correct. The rule was first established in Kentucky with respect to oil and gas in the *Swiss Oil Corporation* case cited in the above quotation, and the latest affirmance thereof is found in the opinion of the Court of Appeals of Kentucky, rendered January 30, 1951, in *James H. Rudy, et al., v. James C. Ellis, et al.,* which opinion is now final and which will shortly be officially reported in 236 S. W. (2d). Therein the measure of damages announced by this Court in *United States v. Wyoming,* 231 U. S. 440, was expressly followed. That is the measure of damages applied by the District Court in the present judgment, i.e., the amount of the gross receipts from said oil, less the cost of producing same.

III.

CONTENTION AS TO RESERVATION IN MORTGAGE INVOLVED.

In the mortgage involved, in which Respondent was the mortgagor, it was expressly provided that "the coal and mining rights under this land" were not mortgaged or affected thereby and were reserved. (R. 126.) It will be noted that Respondent reserved therein not merely the coal and the coal-mining rights, or only coal and the right to mine it, but he reserved the coal and mining rights in general in connection with said land. It is clearly settled under the law in Kentucky, as pointed out in the opinion of the Court of Appeals and under the Kentucky cases cited therein, that the term "mining rights" means minerals, and includes oil and gas.

In addition to such being the construction of the term "mining rights" in Kentucky, we have the following additional undisputed facts that are controlling in this case. Said mortgage was foreclosed in 1916 in the Henderson Circuit Court, a State Court of general jurisdiction in Henderson County, Kentucky. Therein the question was squarely presented to that court as to the extent of the mortgagee's lien, and in its judgment of foreclosure said lien was adjudged to be upon only the surface of the 47 acres involved. The court expressly ordered in such judgment that:

> "The coal and *other* mining rights in and under said 47 acres have heretofore been conveyed *and are not to be sold under this decree.*" (R. 301.)

Pursuant thereto said land, exclusive of the coal and *other* mining rights connected therewith, was sold at the foreclosure sale to the mortgagee, T. J. Arnett, who is predecessor in title to all of the Petitioners. Pursuant to such sale, it was expressly provided in the deed from the Commissioner of the Henderson Circuit Court to their predecessor in title that "the coal and *other* mining rights" in and under said 47 acres were not being conveyed to him. (R. 265-266.) Thus, the coal and other mining rights, or the right to mine all other minerals, appurtenant to said land, remained in the mortgagor, the Respondent herein. The proceedings in said State Court foreclosure suit and the effect of the judgment therein are pointed out in the opinion of the Court of Appeals herein, but no mention is made thereof in the present petition for a Writ of Certiorari.

IV.

CONTENTION AS TO J. W. ELLIS BEING AN INDISPENSABLE PARTY.

By said judgment of November 22, 1948, the court also took possession of the properties involved through its therein appointed conservators, who were authorized and directed to manage, handle and operate said properties pending the accounting ordered. At that time there was no question as to the jurisdiction of the District Court, based upon diversity of citizenship, the plaintiff being a citizen of Florida and the defendants being citizens of Maine, Texas, Illinois, Indiana and Kentucky.

Subsequently on December 10, 1948, an accounting statement was filed, showing the total amount of oil the Petitioners had wrongfully extracted, the prices they had received therefor, and the respective amounts thereof that had been distributed to each of them. It was set out in such statement that there were three persons, J. W. Liles, T. M. Pryor, and J. Ray Stebbins, who were claiming interests in said minerals, with Liles and Pryor each claiming a 3/256 interest, and Stebbins a 1/64 interest therein, and that they were not parties to the litigation. They were perhaps proper parties, but clearly not indispensable parties, thereto, since the Respondent was entitled to sue and have his title quieted against only such trespassers or adverse claimants as he saw fit. *United States v. Oregon*, 295 U. S. 1. However, three days later, on December 13, 1948, Respondent filed an amended complaint making Liles, Pryor and Stebbins parties to the litigation and asking that they be required to answer and set forth the nature of their claims. (R. 473.) Liles and Pryor were citizens of Kentucky and Stebbins was a citizen of Mississippi. Consequently, their citizenship in no way affected the court's jurisdiction.

Subsequently on February 28, 1949, certain of the Petitioners filed motions to dismiss, on the theory that one

J. W. Ellis was an indispensable party to the litigation, and alleging that J. Ray Stebbins had on December 10, 1948, the day said accounting statement was filed, assigned him ¼ of his alleged 1/64 interest, or a 1/256 interest, in said minerals. It was also alleged in said motions that Ellis was a citizen of Florida and that his indispensability destroyed the court's jurisdiction.

The proof showed conclusively, as both the District Court and the Court of Appeals found, and as pointed out in the latter's opinion, that for the following reasons there was no merit to the motions with respect to the alleged indispensability of Ellis as a party:

(1) Such transfer of said 1/256 interest from Stebbins to him, made after the judgment of November 22, 1948, was entered and while the properties involved were *in custodia legis*, was a fictitious and collusive transfer and was made for the fraudulent purpose of trying to destroy the court's jurisdiction; and

(2) Ellis was a *lis pendens* purchaser of such alleged interest, who took with admitted knowledge of and subject to the results of the litigation, and was for said reason not even a necessary party thereto, much less an indispensable party.

CONCLUSION.

We respectfully ask that the Petition for a Writ of Certiorari herein be denied.

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No. 572.

Office Supreme Court,
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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

October Term, 1950.

DELTA DRILLING COMPANY, - - - Petitioners,
SINCLAIR OIL & GAS COMPANY,
W. F. LACY,
B. M. HEATH,
GEORGE A. HOFFMAN,
A. W. WESSELMAN,
A. V. MARTENS,
J. RAY STEBBINS,
J. W. LILES,
T. M. PRYOR,
FLORENCE ARNETT,
FANNIE MOSS,
SUSAN CAREY,
T. S. ARNETT,
GEORGE R. ARNETT,
A. C. ARNETT,
WILLIBIE ARNETT,

versus

THOMAS E. ARNETT, - - - - - - Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

CHARLES G. MIDDLETON,
LOUIS SEELBACH,
LEO T. WOLFORD,
EUGENE B. COCHRAN,
501 S. Second St.,
Louisville 2, Ky.,
RALPH W. GARRETT,
ROBERT L. IMLER,
Sinclair Bldg.,
Tulsa, Okla.,
JACK B. BLALOCK,
CLARENCE LOHMAN,
EDWARD KLIEWER, JR.,
Gulf Bldg.,
Houston 2, Texas,
LEO KING,
F. J. PENTECOST,
Henderson, Ky.,
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Counsel for the Petitioners.

INDEX

PAGE

I. Jurisdiction 2

II. Reasons for Petition for Rehearing 2–4

Appendix—Opinion *Packard Motor Car Co.* v. *Gem Mfg. Co.* (7 C. A.), February 26, 1951 7–9

AUTHORITIES CITED.

Packard Motor Co. v. *Gem Mfg. Co.* (7 C. A.), decided February 26, 1951 2

Rules of Civil Procedure, 54 (b) 2

IN THE

Supreme Court of the United States

October Term, 1950.

No. 572.

DELTA DRILLING COMPANY, - - *Petitioners,*
SINCLAIR OIL & GAS COMPANY,
W. F. LACY,
B. M. HEATH,
GEORGE A. HOFFMAN,
A. W. WESSELMAN,
A. V. MARTENS,
J. RAY STEBBINS,
J. W. LILES,
T. M. PRYOR,
FLORENCE ARNETT,
FANNIE MOSS,
SUSAN CAREY,
T. S. ARNETT,
GEORGE R. ARNETT,
A. C. ARNETT,
WILLIBIE ARNETT,

v.

THOMAS E. ARNETT, - - - - *Respondent.*

PETITION FOR REHEARING.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully pray for a rehearing on the Order of March 26, 1951, denying to them a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

I.

JURISDICTION.

The Petition for Certiorari was denied March 26, 1951. This petition is filed in less than fifteen (15) days thereafter under Rule 33 of the rules of this court.

II.

REASONS FOR PETITION FOR REHEARING.

1. Since the filing of the Petition for Writ of Certiorari herein, there has come to our attention a decision (not yet reported) from the Court of Appeals for the Seventh Circuit in *Packard Motor Car Co.* v. *Gem Mfg. Co.*,* decided on petition for rehearing on February 26, 1951, which is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit herein.

The Seventh Circuit, applying Rule 54(b) of the Rules of Civil Procedure, held that where the District Court directed the entry of a final judgment upon one or more but less than all of the claims presented, but did not make "an express determination that there is no just reason for delay" and "an express direction for the entry of a final judgment," the judgment was interlocutory and non-appealable because of the provision in the Rule that—

> "In the absence of such determination and direction, any order or other form of decision,

*The opinion is printed as an appendix hereto.

> however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims * * *."

We are informed by the Clerk of the Court of Appeals for the Seventh Circuit that a petition for writ of certiorari has been, or is about to be, filed from that decision of the Seventh Circuit.

In the case at bar, the Sixth Circuit held that an order entered November 22, 1948, styled "Interlocutory Order and Judgment" was a final judgment (R. 775), although it provided (R. 360) that "this cause is now continued on the undisposed of issues herein," and that the order was "interlocutory in character" and "non-appealable."

As shown by that order, other claims between the parties then before the Court were left for future determination.

Twenty-one days after that "Interlocutory" Order was entered, and before the time for any appeal therefrom had expired, the Respondent joined as defendants in the suit three other parties who were claimants to an interest in the oil and gas (R. 460, 473). Since the Respondent sought a cancellation of the mineral deeds and leases (R. 15), the Sixth Circuit properly held (R. 781):

> "This was an indivisible contract which could not be held valid in part and invalid in part."

Admittedly, in this character of case a decision as to the title to some of the defendants could not be finally made until it was made as to all.

There is a conflict between the Sixth and Seventh Circuits in the application of Rule 54(b) of the Rules of Civil Procedure. Unless that conflict is resolved, litigants will not be able to rely upon a District Court's determination that its order is "interlocutory" and "non-appealable," the application of Rule 54(b) will continue in doubt, and parties may become entrapped, as in this case, in reliance upon the District Court's determination that its order was not final.

2. In the Respondent's Reply to the Petition for Writ of Certiorari in the case at bar, he states that both the District Court and the Court of Appeals "found" that the conveyance to Ellis (a Florida resident, as was the Respondent) "was a fictitious and collusive transfer and was made for the fraudulent purpose of trying to destroy the Court's jurisdiction." That was not the holding of either Court. The Court of Appeals said (R. 781):

> "The District Court did not find that the transaction was void for fraud, but held that Ellis was not an indispensable party, and that jurisdiction was not defeated."

This is an intervening circumstance of substantial effect as required by this Court's Rule 33.

WHEREFORE, the Petitioners pray that the petition for Writ of Certiorari be re-examined and reconsidered with the view that the Writ be granted.

Respectfully submitted,

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F. J. PENTECOST,
Henderson, Ky.,

CLARENCE BARTLETT,
Owensboro, Ky.,
Counsel for the Petitioners.

We hereby certify that the foregoing Petition for Rehearing is filed in good faith and not for the purpose of delay and is restricted to the grounds specified in Rule 33, paragraph 2 of this Court.

Charles G. Middleton

Leo T. Wolford